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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re K. B., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

YOLANDA B.,

Defendant and Appellant.

D042134

(Super. Ct. No. J514641)

APPEAL from a judgment of the Superior Court of San Diego County, Cynthia
Ann Bashant, Judge. Reversed and remanded.

Yolanda B. appeals a judgment terminating her parental rights to her daughter
K. B. She contends the court abused its discretion in denying her request for
reunification services, denying her motion for changed circumstances, and in terminating

her parental rights based on findings that the child was adoptable and would not benefit from a continued relationship with her. She also contends that her due process rights were violated by the refusal of the San Diego County Health and Human Services Agency (the Agency) to permit frequent visitation. We agree with Yolanda's first contention and reverse the judgment on that basis, thus eliminating the need to reach the remainder of her arguments.

BACKGROUND

Yolanda gave birth to the child in September 2002. Although she was born healthy and tested drug free, Child Protective Services took her into protective custody based on a referral alleging she was at risk for severe neglect if left in Yolanda's care. Shortly thereafter, the Agency initiated dependency proceedings relating to the child based on Yolanda's 14-year history of cocaine and methamphetamine use, her failure to reunify with her other eight dependent children who had been removed from her in Los Angeles, and her denial of the need for drug treatment.

The Agency detained the child in the hospital. The social worker's report prepared for the detention hearing indicated that Yolanda had been drug free during the last four months of her pregnancy, that she was excited about the child's birth, that she was "loving and appropriate" with the child and cooperative with hospital staff, and that Yolanda indicated she was "finally clean" and intended to stay that way. The social worker told Yolanda she would have six months to reunify with the child and Yolanda responded that "she would do whatever it took to get [the child] back." At the detention hearing, the

juvenile court ordered the child to be detained at the Polinsky Child Center, with ultimate placement in a foster home, and liberal supervised visitation with Yolanda.

The social worker's jurisdiction/disposition report indicated Yolanda had expressed surprise that the child was removed from her care, that she felt capable of caring for the child, and that she intended to change her past habits. The report also stated that Yolanda had been cooperative with the Agency, had attended a family team meeting, and had undergone an assessment under the juvenile court's Substance Abuse Recovery Management System (SARMS). The social worker reported that Yolanda had visited the child "consistently" and that, during the visitations, Yolanda was physically affectionate with and focused her attention on her daughter. However, based on Yolanda's past inability to stay drug free and to maintain stable housing and employment, the social worker recommended that the court set a hearing to terminate Yolanda's parental rights and free the child for adoption.

At the jurisdictional/contested dispositional hearing in October 2002, the juvenile court made true findings on the Agency's petition, declared the child a dependent of the court, denied Yolanda reunification services pursuant to Welfare and Institutions Code section 361.5, but allowed Yolanda continued visitation. (All further statutory references are to the Welfare and Institutions Code.) The court also set a hearing under section 366.26 for February 2003. Shortly after the jurisdictional hearing, the Agency placed the child in the foster home of Sheila R.

According to the social worker's reports relating to the section 366.26 hearing, Yolanda had visited the child regularly for one to two hours once each week, except for one month when her residential treatment center did not authorize visits. Yolanda was attentive, affectionate and positive during visits, and expressed interest in the child's care and well-being. She also took responsibility for responding if the child became fussy. However, the social worker felt that the child deserved a permanent and stable home; she opined that based on Yolanda's history, "the stability of a permanent adoptive home outweighs the benefits from continuing the legal parent-child relationship." The report recommended that the court terminate Yolanda's parental rights and place the child for adoption.

In early February 2003, the child was moved out of Sheila R.'s home into a prospective adoptive home. Shortly before the date originally set for the section 366.26 hearing, Yolanda filed a section 388 motion, requesting that the court allow her expanded supervised and unsupervised visits with the child and reunification services. To establish changed circumstances and that the requested relief was in the child's best interests, Yolanda alleged that she was now in a sober living facility, had paid her own rent, was employed full time and had been clean and sober since May 12, 2002. Yolanda also made an offer of proof that she had completed parenting classes through the Community Resources and Self Help program (CRASH), was participating in the CRASH short-term aftercare program, and had been visiting the child regularly and appropriately. She also indicated that weekend visits were allowed at her sober living facility and she was on the

waiting list for another facility that also allowed visits. Finally, she contended that foster parent Sheila R. would testify in support of her relationship with the child.

At the May 2003 hearing, Sheila R. testified about Yolanda's skills in caring for the child and that Yolanda was "a totally appropriate mother." Sheila R. felt that Yolanda was "the most dedicated" and "the most sincere" parent she had met and was sweet, sincere and had a good attitude. She indicated that Yolanda always wanted what was in the child's best interests and had "a wonderful relationship" with the child. Yolanda also testified, indicating that although the court declined to order services for her, she participated in SARMS, where she had no positive drug tests, and entered the CRASH short-term residential program, where she had learned to deal with problems underlying her drug addiction such as unexpressed anger which led to self-medicating with drugs. Yolanda testified that she still attended CRASH three or four times a week, although she was only required to attend once a week, and that her abstinence from drugs since four months before the child's birth reflected her longest period of sobriety since she began using drugs at age 19 (approximately 16 years earlier). Yolanda was on step one of the Narcotics Anonymous program, began a full-time job and had consistently visited her daughter steadily since the child was one week old.

The social worker testified that at the two latest visits the child cried, looked for her caregiver and was comforted by having her caregiver in view; on occasion Yolanda had placed the child so that she could see the caregiver. The social worker felt that it would be in the child's best interests to have a permanent plan due to her young age and

attachment to her caregiver, and that additional visits would not benefit the child; she also admitted that she had not seen any inappropriate visits between Yolanda and the child, and that Yolanda had generally been open and honest with her.

The court found Yolanda had established a change of circumstances but that it was not in the child's best interests to allow services to Yolanda. It found the child adoptable and that none of the circumstances that would make the termination of parental rights detrimental to the child existed. It terminated Yolanda's parental rights and placed the child for adoption, but authorized the social worker to allow Yolanda visitation if the adoptive parents would allow it. Yolanda appeals.

DENIAL OF SERVICES AT THE JURISDICTIONAL HEARING

In this proceeding, Yolanda attempts to challenge the juvenile court's denial of reunification services at the October 2002 jurisdictional and dispositional hearing. However, Yolanda's failure to seek timely writ review of this order prevents her from challenging it now, unless the court failed to give her timely and proper notice of her right to seek writ review. (*In re Rashad B.* (1999) 76 Cal.App.4th 442, 446-450; *In re Cathina W.* (1998) 68 Cal.App.4th 716, 721-722.) Pursuant to section 366.26, subdivision (*l*), the court must give notice orally at the hearing if the parent is present in court or, if the parent is not present, must give notice by first class mail sent within 24 hours of the hearing. (Cal. Rules of Court, rule 1436.5(d); rule references are to the California Rules of Court.)

Here, Yolanda was present with counsel at the October 2002 hearing. However, although the court minutes reflect that the court "advised [Yolanda] that a petition for extraordinary writ review must be filed in order to preserve any right to appeal the findings and orders made by the court in setting a hearing pursuant to section 366.26," the reporter's transcript of the hearing shows no such advisement. We therefore conclude that the court did not give Yolanda the writ notification at the hearing. (*People v. Smith* (1983) 33 Cal.3d 596, 599; *In re Josue G.* (2003) 106 Cal.App.4th 725, 731, fn. 4.)

The question then becomes whether the court gave Yolanda written notice sent by mail within 24 hours of the hearing as required under rule 1436.5(d). The hearing was on a Friday; on the following Monday the court clerk mailed Yolanda the requisite notification. Although rule 1436.5(d) does not expressly so state, it is well established that the computation of the period for performance of any act required by law to occur within a specified period does not include intervening weekends or holidays. (Code Civ. Proc., §§ 12a, 12b; see *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 706.) Thus, the mailing of the notice to Yolanda on the Monday following the Friday hearing was timely. Thus, she was given proper notice of her right to file a writ petition and she cannot now challenge the October 25 denial of services.

DENIAL OF THE SECTION 388 PETITION

The juvenile court may modify an order if a parent shows, by a preponderance of the evidence, the existence of changed circumstances or new evidence and that the requested modification would promote the child's best interests. (§ 388; *In re Michael B.*

(1992) 8 Cal.App.4th 1698, 1703.) In ruling on a modification motion, the court must consider the seriousness of the problem leading to the dependency and the reason for its continuation; the strength of the parent-child and child-caretaker bonds and the time the child has been in the system; and the nature of the changed circumstances, the ease by which they could be achieved, and the reason they did not occur sooner. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530-532.) After the juvenile court terminates reunification services (or if, as here, it does not order reunification services at the outset), a parent's interest in the care, custody and companionship of the child is no longer paramount (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317) and the focus is instead on the child's needs for permanency and stability (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309). "Whether a previously made order should be modified rests within the dependency court's discretion, and its determination will not be disturbed on appeal unless an abuse of discretion is clearly established." (*In re Michael B., supra*, 8 Cal.App.4th at p. 1704.)

At the hearing on the motion, the court determined that Yolanda's circumstances had changed but it would not be in the child's best interests to grant the section 388 petition, interweaving its praise of Yolanda's "amazing" progress with its acknowledgement that the child needed a stable home. The court stated:

"Everything [Yolanda] says shows me that she is -- she is not going to use again, you are not going to go back and I do believe in you and I believe that, and I am prepared to find there are changed circumstances.

"We are at a point where I do have to look at [the child's] best interest and I can't -- I can't find it is in her best interest to prolong

this anymore and that's hard for me because I want to, because I think you are doing such a great job and I look at where you have been and where you are now and, I mean, just everything [Yolanda] said during her testimony about I am learning I can't do it myself, I have to rely on other people. You have learned so much in just -- this has been, what, four months since I last saw you and you have learned so much and I am so proud of you for being here. And I wish that it was different and that I could look at this something other than the best interest of [the child] but I think in the best interest of [the child] I have to deny the 388. I do. I think she needs a permanent plan.

"I think she is attached to the home where she is and I think it is going to be a long, slow process for you in the future. You still have a lot of working on you to go and I think you are doing it and as I say, I believe in you.

"I had this kind of feeling when you came in four months ago and I look at this, this is amazing. That's when I looked at the SARMS report. That's why I knew the SARMS reports were as good as they were because you know when someone usually starts out there [are] some rough points and you didn't -- I really think that time period when you were pregnant with [the child] struggling with yourself was where you worked to that point of no return where you said I am ready and I am going to do it now and you did it."

There is no question that ample evidence in the record supports the juvenile court's finding of changed circumstances. It was undisputed that Yolanda had remained sober, undertook various classes even though she was not ordered to do so, obtained employment and housing, and visited regularly and positively with the child. The court also found, however, that Yolanda's requested modification would not be in the child's best interests. In this respect, we conclude the juvenile court abused its discretion. The evidence showed Yolanda had bonded with the child and was committed to reunifying with her. She began an outpatient program at CRASH shortly after the child's birth and

later decided, on her own, that she needed residential treatment. During the eight-month interval between the filing of the dependency petition and the hearing on the section 388 petition, Yolanda did everything she could to nurture and strengthen her bond with the child, going far beyond what was required of her. The juvenile court was moved by Yolanda's testimony, which showed a strong determination to overcome her drug problem and an unusual depth of understanding of why she fallen into addiction. Indeed, the court had referred Yolanda to SARMS because it "got the feeling [Yolanda] was ready and [she was]."

In light of the evidence that Yolanda had successfully stopped engaging in the destructive behaviors that had provided the basis for the child's detention, the only evidence supporting the court's conclusion that the proposed modification would not be in the child's best interests was that the child had become attached to her adoptive caregiver during the three months the child had been in the caregiver's home. In light of all of the circumstances, we conclude that this is not a sufficient basis on which to conclude that providing Yolanda expanded visitation and services would not be in the child's best interests.

On this record the court should have granted the section 388 petition. We accordingly reverse the order denying that petition and remand the matter to the juvenile court, directing it to provide Yolanda with expanded visitation and whatever services the court deems appropriate, if she is still clean and sober. Because the juvenile court should

have granted Yolanda's section 388 petition, it also erred by proceeding to hold the section 366.26 hearing and terminating parental rights.

DISPOSITION

The judgment is reversed and the matter remanded to the juvenile court for further proceedings consistent with this opinion.

McINTYRE, J.

I CONCUR:

HALLER, J.

I CONCUR IN THE RESULT:

HUFFMAN, Acting P. J.